

**N. D. Peters & Company and International Brotherhood of Teamsters, Local Union 182, AFL-CIO. Case 3-CA-19517**

August 16, 1996

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND FOX

Upon a charge filed on July 25, 1995, a complaint and notice of hearing issued on September 28, 1995. The complaint alleged that the Respondent, N. D. Peters & Company, violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to pay, to the health and hospital fund and pension and retirement fund, contributions on behalf of its unit employees. Copies of the charge and the complaint were served on the Respondent. On October 5, 1995, the Respondent filed an answer to the complaint denying the commission of any unfair labor practices.

On April 5, 1996, the above-named parties and the counsel for the General Counsel of the National Labor Relations Board (the General Counsel) jointly filed a motion to transfer proceedings to the Board and a stipulation of facts. The parties agreed that the unfair labor practice charge, complaint, stipulation of facts, and answer, as amended by the stipulation of facts, constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before an administrative law judge, and issuance of an administrative law judge's decision, and desire to submit this case for findings of fact, conclusions of law, and order directly to the Board.

On May 14, 1996, the Board issued an order approving the stipulation and transferring the proceeding to the Board. Thereafter, the General Counsel filed a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, a New York corporation, with its principal office and place of business located at 840 Broad Street, Utica, New York, is a ready-mix concrete supplier. During the 12-month period ending March 19, 1996, the Respondent sold and shipped goods and materials valued in excess of \$50,000 from its Utica facility to other enterprises directly engaged in interstate commerce.

The parties stipulated, and we find, that the Respondent has been at all material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Brotherhood of Teamsters, Local Union 182, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

*A. Stipulated Facts*

**1. The unit and the Union's representative status**

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All Drivers, Power-Driven Concrete Block Machine Operators, Concrete Block Plant Mixer Men, Yardmen, Batch Men, Mill Men, Truck Helpers and Mechanics.

Since about 1975, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from March 1, 1992, to February 28, 1995. At all times since 1975, based on Section 9(a) of the Act, the Union has been the exclusive bargaining representative of the unit.

**2. Refusal to bargain**

Under the provisions of the 1992-1995 collective-bargaining agreement, the Respondent was required to make contributions to the aforementioned funds on behalf of unit employees. Specifically, the Respondent was required to make contributions to the following funds:

**Article 5**

*New York State Teamsters Health and Hospital Fund*

**Article 6**

*New York State Teamsters Conference Pension and Retirement Fund*

Articles 5 and 6 are mandatory subjects for the purpose of collective bargaining.

Despite the requirements of the 1992-1995 collective-bargaining agreement, the Respondent failed to comply with the provisions of articles 5 and 6 from April 10 to October 15, 1995, without affording the Union an opportunity to bargain with the Respondent

with respect to this conduct and the effects of this conduct.

Following negotiations, on October 15, 1995, the parties reached impasse on the Respondent's proposals to substitute provisions for articles 5 and 6.

### 3. The Respondent's defense

The Respondent stipulates, and the Union and the General Counsel do not dispute, that its failure to comply with articles 5 and 6 from April 10 to October 15, 1995, is due to poor business conditions and cash-flow problems and, further, that it has paid certain delinquencies to the union funds.<sup>1</sup>

### B. Contentions of the Parties<sup>2</sup>

The General Counsel notes that the Respondent acknowledges its failure to comply with the contract's requirements to make contributions to the health and hospital and retirement funds. The General Counsel asserts that the Respondent's defense that it is financially unable to pay does not excuse its failure to make the required fund contributions. Citing *Kane Systems Corp.*, 315 NLRB 355 (1994), the General Counsel argues that by failing to comply with articles 5 and 6 of the contract without affording the Union an opportunity to bargain the Respondent has violated Section 8(a)(5) and (1).

### C. Discussion

We agree with the General Counsel that the Respondent violated Section 8(a)(5) and (1) by failing, for the period of April 10 to October 15, 1995, to make required contributions to the New York State Teamsters Health and Hospital Fund and the New York State Teamsters Conference Pension and Retirement Fund.

It is well settled that, in the absence of unusual circumstances not here present, after a collective-bargaining agreement expires, "an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations." *Triple A Fire Protection*, 315 NLRB 409, 414 (1994); see also *id.* at 416, 422. This includes making contributions to fringe benefit funds as specified in the expired collective-bargaining agreement. *Lou's Produce, Inc.*, 308 NLRB 1194 (1992).

Here, the Respondent admits that it has failed to make fund contributions as required under the terms of

the expired 1992–1995 collective-bargaining agreement. Its sole defense is that poor business and cash-flow problems have prevented it from fully complying with its contractual requirements. However, it is well established that an employer is prohibited under Section 8(a)(5) and (1) from modifying the terms and conditions of employment set forth in the applicable collective-bargaining agreement without the consent of the Union. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989). The fact that it additionally claims an inability to make the required contributions is no defense to the 8(a)(5) and (1) allegations. *Endicott Forging & Mfg.*, 319 NLRB 180 (1995); *Kane Systems Corp.*, supra.

Accordingly, by these acts and conduct, the Respondent has refused to bargain collectively and in good faith with the Union, the exclusive collective-bargaining representative of its unit employees, and has thereby been engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

### CONCLUSIONS OF LAW

1. The Respondent, N. D. Peters & Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Local Union 182, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to make required contributions on behalf of unit employees to the New York State Teamsters Health and Hospital Fund and to the New York State Teamsters Conference Pension and Retirement Fund, for the period of April 10 to October 15, 1995, as required by articles 5 and 6 in the parties' 1992–1995 collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having additionally found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the New York State Teamsters Health and Hospital Fund and to the New York State Teamsters Conference Pension and Retirement Fund on behalf of unit employees, we shall order the Respondent to make these employees whole by making all delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in

<sup>1</sup> The parties stipulated that issues relating to the amounts owed, and the individuals for whom payments are owed, are to be resolved in a subsequent compliance proceeding. The Respondent specifically disputes that funds are owed on behalf of Raymond Bronson, Rafael Gapelli, and Jose Rivera, and does not admit that these individuals are members of the bargaining unit or that they perform bargaining unit work.

<sup>2</sup> Only the General Counsel filed a brief with the Board.

*Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>3</sup>

### ORDER

The National Labor Relations Board orders that the Respondent, N. D. Peters & Company, Utica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Teamsters, Local Union 182, AFL-CIO as the exclusive collective-bargaining representative of unit employees by failing and refusing to make required contributions to the New York State Teamsters Health and Hospital Fund and to the New York State Teamsters Conference Pension and Retirement Fund, for the period covering April 10 to October 15, 1995.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit the required contributions to the New York State Teamsters Health and Hospital Fund, including any additional amounts owed the Fund, and make whole employees for any expenses ensuing from its failure to remit contributions, in the manner set forth in the remedy section of this decision.

(b) Remit to the New York State Teamsters Conference Pension and Retirement Fund the required contributions, including any additional amounts owed the Fund, and reimburse unit employees for any expenses ensuing from the Respondent's failure to make the required payments, in the manner set forth in the remedy section of this decision.

(c) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All Drivers, Power-Driven Concrete Block Machine Operators, Concrete Block Plant Mixer Men, Yardmen, Batch Men, Mill Men, Truck Helpers and Mechanics.

(d) Preserve and, within 14 days of any request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and re-

<sup>3</sup> To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the Fund.

ports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Utica, New York, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since April 10, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

### APPENDIX

#### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Teamsters, Local Union 182, AFL-CIO as the exclusive collective-bargaining representative of our unit employees by failing and refusing to remit required contributions to the New York State Teamsters Health and Hospital Fund and to the New York State Teamsters Conference Pension and Retirement Fund.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make the required contributions to the New York State Teamsters Health and Hospital Fund, including any additional amounts due the Fund, and WE WILL make the unit employees whole by reimburs-

ing them for any expenses ensuing from our failure to make the required contributions, with interest.

WE WILL remit the unpaid contributions to the New York State Teamsters Conference Pension and Retirement Fund, including any additional amounts due the Fund, and WE WILL reimburse the unit employees for any expenses ensuing from our failure to make the required payments, with interest.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All Drivers, Power-Driven Concrete Block Machine Operators, Concrete Block Plant Mixer Men, Yardmen, Batch Men, Mill Men, Truck Helpers and Mechanics.

N. D. PETERS & COMPANY